

Honorable Marc Barreca
Chapter 11
Hearing Date: August 4, 2016
Hearing Time: 9:30 a.m.
Response Date: July 28, 2016

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WASHINGTON

In Re:)	Case No. 10-14407
)	
Gary R. McLean,)	
)	UNITED STATES TRUSTEE'S
)	MOTION FOR DISGORGEMENT OF
Debtor.)	ATTORNEY'S FEES
)	
)	
)	

The United States Trustee hereby requests that the Court exercise its inherent authority to order Lasher Hozapfel Sperry & Ebberson ("Lasher") to disgorge approximately \$369,000 in fees received for services rendered to Gary R. McLean (the "Debtor") during the above-captioned chapter 11 case (the "Case" and the "Motion").¹ The United States Trustee asserts that the relief sought is necessary and appropriate because Lasher perpetrated a fraud on the Court, failed in its duty of candor to the Court, and violated fiduciary duties to the bankruptcy estate and creditors, in conjunction with improperly obtaining dismissal of the Case. The declarations of Martin L. Smith (the "Smith Decl.") and Jerry R. Kimball (the "Kimball Decl.") in support of the Motion are being filed concurrently herewith.

¹ The United States Trustee asserts that some of the actions described herein also violate Bankruptcy Rule 9011(b). However, because the safe harbor required by Bankruptcy Rule 9011(c)(1)(A) cannot be provided to Lasher at this point under the unusual procedural posture of the reopened chapter 11 case, the United States Trustee is not seeking sanctions for violation of Bankruptcy Rule 9011. The Court, of course, has the ability to impose sanctions under Rule 9011(c)(1)(B) without the need for a safe harbor.

UNITED STATES TRUSTEE'S MOTION FOR DISGORGEMENT
OF ATTORNEY'S FEES - 1

Office of the United States Trustee
700 Stewart Street
Suite 5103
Seattle, WA 98101-1271
206-553-2000, 206-553-2566 (fax)

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I. OVERVIEW

As discussed below, Lasher and its attorneys perpetrated a fraud on this Court and on parties in interest. The firm intentionally withheld critical material facts from the Court and creditors; knowingly filed an inaccurate pleading; and fraudulently and in bad faith obtained dismissal of the Case under false pretenses for an improper purpose. Specifically, Lasher moved to dismiss the Case based on the Debtor's alleged lack of financial resources. However, during the time leading up to the hearing on the dismissal motion, Lasher became aware that the Debtor would receive approximately \$2.2 million in a matter of weeks from a sale of the assets of a related entity, Graphic Sciences, Inc. ("Graphic Sciences"), and the transactions relating to that sale. The \$2.2 million should have become property of the estate, available to pay creditors. By concealing the Debtor's imminent windfall and underlying transactions, Lasher obtained settlements with the Debtor's two largest secured creditors which included withdrawal of their objections to dismissal of the case. Lasher also hid the Debtor's imminent change of financial circumstances from the Court both in a reply pleading filed prior to the hearing on dismissal and by not informing the Court at the dismissal hearing -- even though the Graphic Sciences sale was already scheduled to close within two weeks of that hearing. Lasher willfully disregarded its duty of candor to the Court and, worse, actively engaged in misrepresentation and deceit in order to obtain dismissal of the Case and allow the Debtor, rather than his creditors, to benefit from the \$2.2 million in proceeds related to the asset sale.

The extent of Lasher's conspiracy with the Debtor is evidenced by events subsequent to the dismissal hearing. The \$2.2 million was received by Lasher on the Debtor's behalf just 12 days after the Case was dismissed (and while the Case was still open). Within two days of receipt, Lasher acted in concert with the Debtor to disseminate the funds by transferring almost \$221,000 to itself, \$800,000 to the Debtor's girlfriend, and another \$800,000 to various entities owned or controlled by the Debtor. The Graphic Sciences transactions, and receipt and use of the money, only came to the attention of the United States Trustee last year when one of the Debtor's defrauded creditors filed a lawsuit detailing the scheme. Under the circumstances,

1 the Court's invocation of its inherent authority to require Lasher to disgorge fees received from
2 the Debtor relating to the Case in an amount not less than \$369,000 is appropriate and warranted.

3 4 II. FACTS²

5 A. Background.

6 The Case was filed on April 20, 2010 (the "Petition Date"). In his Schedules of Assets
7 and Liabilities filed on May 4, 2014 (collectively, the "Schedules" and each a "Schedule"), the
8 Debtor lists assets of just over \$30 million, and debts of almost \$20 million. ECF document no.
9 13. The value of the Debtor's interest in Graphic Sciences is listed on Schedule B as
10 "unknown." The Schedules do not list any receivables owing to the Debtor from Graphic
11 Sciences.

12 The majority of the asset value on the Schedules, approximately \$26 million, is attributed
13 to the Debtor's stock in Interstate Distributor Company ("IDC"). IDC was listed in the Debtor's
14 amended Schedule D as having a secured claim of \$2.6 million, although IDC filed several
15 proofs of claim that totaled substantially more. *See* proofs of claim nos. 12-1, 13-1, 14-1 and 14-
16 2, 15-1, 16-1, 17-1 and 17-2, 18-1, 19-1, 20-1, 21-1, 22-1, and 25-1. Amended Schedule D is
17 part of ECF document no. 54.

18 In addition to IDC, the other primary creditor in the Case was the Debtor's former
19 spouse, Kathleen McLean ("Ms. McLean"). During the course of the Case, Ms. McLean was
20 represented by Alan Wenokur ("Wenokur") and Jerry Kimball ("Kimball"). The Debtor listed
21 Ms. McLean in amended Schedule D, ECF document no. 54, with secured claims totaling \$11
22 million. Ms. McLean filed a proof of claim, no. 11-1, in the amount of \$11,434,728.

23 The Case was filed primarily because of prepetition actions by IDC and Ms. McLean.
24 *See* Ex Parte Application for Order Authorizing Employment of Special Counsel for Debtor at
25 ECF no. 63. The Debtor's amended Schedule F, part of ECF document no. 54, lists total

26 ² A timeline of many of the important dates in the Case that are relevant to the Motion is attached
to the Smith Decl. as **Exhibit 1**.

1 unsecured claims of \$60,484 – including \$17,000 owed to the Debtor’s self-described
2 “girlfriend” Marie Durflinger (“Ms. Durflinger”).

3 1. The Debtor’s Employment of Counsel.

4 Lasher was employed as the Debtor’s general bankruptcy counsel. The primary Lasher
5 attorneys providing services to the Debtor were partner Kevin Hanchett (“Hanchett”), and
6 associates Timothy Steen (“Steen”) and Jeffrey Smoot (“Smoot”). The Lasher employment
7 application, declaration of Hanchett, and Order employing Lasher are ECF documents no. 63,
8 64, and 69, respectively.

9 The Debtor also hired Vandeberg, Johnson & Gandara, LLP (“Vandeberg”) solely to
10 represent him regarding issues with IDC. Darren Nitz (“Nitz”) was the primary attorney at
11 Vandeberg who provided services to the Debtor. The Vandeberg employment application,
12 declaration of Nitz, and Order employing Vandeberg are ECF documents no. 27, 28, and 31,
13 respectively. Vandeberg was never authorized to represent the Debtor for any purpose other
14 than shareholder issues relating to IDC.

15 2. Lasher’s Motion to Dismiss.

16 Lasher filed a motion to dismiss the Case on July 11, 2011 (the “Dismissal Motion”).
17 ECF document no. 372. The Dismissal Motion described the history of the postpetition sale of
18 the Debtor’s IDC stock by Ms. McLean for less than the Debtor anticipated, and concluded that
19 because of the loss of that asset “[t]he Debtor no longer has sufficient assets to be able to
20 propose a feasible plan of reorganization.” Dismissal Motion, p. 3, ¶ 6. Lasher also stated, in
21 paragraph 9 of the Dismissal Motion, that the Debtor’s secured creditors “will not be prejudiced
22 by dismissal of the case.”

23 Ms. McLean filed an objection to the Dismissal Motion on July 29, 2011. ECF
24 document no. 377. In her objection, Ms. McLean strenuously argued that conversion, not
25 dismissal, was in the best interest of creditors so that a trustee could liquidate the Debtor’s
26 assets. As part of her argument, Ms. McLean recited what she believed to be the Debtor’s

1 potentially most valuable remaining assets. The Debtor's interest in Graphic Sciences was
2 conspicuously missing from that list – presumably because Lasher concealed the asset sale,
3 which it knew was being actively negotiated at the time, from Wenokur and Kimball.³

4 IDC filed a response to the Dismissal Motion on September 2, 2011. ECF document no.
5 386. The IDC response informed the Court that settlement negotiations with the Debtor were
6 ongoing, and that if they were successful then IDC would support the Dismissal Motion, but if
7 the negotiations were not successful then IDC joins in Ms. McLean's objection requesting
8 conversion of the Case to chapter 7.

9 On September 6, 2011, Lasher filed a reply to Ms. McLean's objection to the Dismissal
10 Motion (the "Dismissal Reply"). ECF document no. 387. The Dismissal Reply relied on some
11 of the same arguments that were in the Dismissal Motion, *i.e.* that IDC and Ms. McLean would
12 not be prejudiced by dismissal because they held liens on all of the estate's assets and they could
13 pursue their state law rights and remedies. Critically, the Dismissal Reply contains no mention
14 of the impending Graphic Sciences transactions and the anticipated \$2.2 million windfall to the
15 Debtor.

16 The initial hearing on the Dismissal Motion was set for August 5, 2011, but was
17 continued several times. Eventually, a hearing was held on September 23, 2011. Smoot
18 appeared for Lasher at the hearing on the Debtor's behalf. Smoot informed the Court that all of
19 the objections had been withdrawn.⁴ The Court indicated that it would grant the Dismissal
20 Motion, but inquired about why the objections were withdrawn and asked if it was because the
21 parties had worked out something on the remaining assets. In response, Smoot represented to
22 the Court that the parties had been working on a settlement agreement for eight weeks, and that it

23 ³ As discussed in section II.B. hereof, the Debtor signed a letter of intent for the Graphic
24 Sciences sale 9 days prior to Ms. McLean's objection. The other reasons why Ms. McLean did
25 not believe that there was much, if any, value in the Debtor's interest in Graphic Sciences is
26 detailed in the Kimball Decl., ¶¶ 9 through 14.

⁴ The objections were withdrawn the day before the hearing, as reflected in ECF docket nos. 388
and 389.

1 had just been finalized the day before.⁵ However, it is what Smoot did not say that is important.
2 As with the Dismissal Reply, Lasher, through Smoot, once again withheld from the Court the
3 fact that if the Case remained in bankruptcy the estate would receive \$2.2 million in
4 unencumbered funds in 12 days. The Court indicated that it was glad everything was resolved
5 and concluded the hearing. The transcript of the hearing is at ECF docket no. 446. The Court
6 entered the Order granting the Dismissal Motion the same day as the hearing. ECF document
7 no. 391. The Case was closed on October 14, 2011.

8 3. Lasher and Vandeberg Fee Applications.

9 Lasher and Vandeberg each filed applications for interim compensation in December,
10 2010 (together, the “Fee Applications”). ECF documents nos. 213 and 217, respectively. IDC
11 and Ms. McLean each objected to both Fee Applications, but the applications were ultimately
12 approved by entry of an Agreed Order Approving First Applications for Interim Compensation
13 and Reimbursement of Expenses of Professionals (the “Fee Order”). ECF document no. 232.
14 The Fee Order approved Lasher’s fees in the amount of \$192,203.74 for services from the
15 Petition Date to September 30, 2010. At the time the Fee Order was entered, Lasher apparently
16 held a \$62,530 retainer, which it applied to its allowed fees on December 15, 2010. On or about
17 December 30, 2010, the Debtor paid Lasher another \$84,209. *See* Smith Decl., **Exhibit 3**. The
18 Fee Order also approved fees for Vandeberg of \$32,512 for services from the Petition Date to
19 October 31, 2010. Vandeberg was paid \$32,410.50 sometime in August 2011.⁶

20 B. Sale of Graphic Sciences.

21 The Debtor owned 50% of Graphic Sciences, and the other 50% was owned by the
22 Debtor’s business partner Kent Wishart (“Wishart”), who was incarcerated at the times relevant
23

24 ⁵ A copy of the Settlement Agreement and Release between the Debtor, Ms. McLean, IDC and
25 Saltchuk Resources, Inc. (the “Creditor Settlement Agreement”) is attached to the Smith Decl. as
26 **Exhibit 2**.

⁶ Payment is reflected on Vandeberg’s billing statement dated August 31, 2011, a copy of which
is attached to the Smith Decl. as part of **Exhibit 4**.

1 hereto. The Debtor scheduled his interest in Graphic Sciences as having an “unknown” value.
2 ECF document no. 13.

3 Graphic Sciences received a letter of intent dated June 9, 2011, from Mosley Holdings,
4 Inc. (the “Purchaser”) for the purchase of all of its assets for a price of \$3.75 million plus
5 assumption of certain liabilities (the “Initial LOI”). A copy of the Initial LOI is attached to the
6 Smith Decl. as **Exhibit 5**.

7 On July 20, 2011, shortly after the Dismissal Motion was filed, the Debtor received a
8 second letter of intent from the Purchaser reflecting a purchase price of \$2.7 million in cash plus
9 certain additional consideration (the “Second LOI”). The Debtor signed the Second LOI on July
10 20, 2011, and Wishart signed it on August 1, 2011. A copy of the Second LOI is attached to the
11 Smith Decl. at **Exhibit 6**.

12 Graphic Sciences announced the asset sale in a Memorandum from President Jeff
13 Ashburn to certain employees of the company on August 4, 2011 (the “Memorandum”). The
14 Memorandum states on its first page: “The purpose of this message is to inform each of you that
15 Graphic Sciences’ ownership has signed a Letter of Intent to sell substantially all of its assets to
16 Mosley Holdings.” A copy of the Memorandum is attached to the Smith Decl. as **Exhibit 7**.

17 At some point after the Second LOI was executed, drafts of Asset Purchase Agreements
18 were circulated among the parties to the transaction. For example, a copy of a draft Asset
19 Purchase Agreement from August, 2011 (the “Draft Purchase Agreement”) produced from
20 Lasher’s files is attached to the Smith Decl. as **Exhibit 8**. It is clear from an email dated
21 August 17, 2011, from Vandenberg attorney Nitz that the Draft Purchase Agreement was at least
22 the second version of the document. In that email, Nitz requests certain revisions to the previous
23 form of the Asset Purchase Agreement already reflected in the Draft Purchase Agreement.
24 Nitz’s changes included a reduction in the purchase price from \$2.7 million to \$1.85 million, and
25 the addition of a non-compete agreement for the Debtor. A copy of the August 17, 2011, email
26 from Nitz is attached to the Smith Decl. as **Exhibit 9**.

1 A final Asset Purchase Agreement, dated September 21, 2011, was ultimately executed
2 (the “Final Purchase Agreement”). A copy of the Final Purchase Agreement is attached to the
3 Smith Decl. as **Exhibit 10**. Pursuant to the Final Purchase Agreement, the Graphic Sciences
4 asset sale closed on October 4, 2011.

5 As required by the terms of the Final Purchase Agreement, the Debtor also signed a Non-
6 Compete Agreement (the “Non-Compete”) which, among other things, required the Purchaser to
7 pay the Debtor \$890,000. A copy of the Non-Compete is included with the Final Purchase
8 Agreement as **Exhibit 10**. Ultimately, Graphic Sciences directed that \$1,306,544 of the sale
9 proceeds should be paid to the Debtor as repayment of amounts he purportedly loaned to
10 Graphic Sciences.⁷ Therefore, as a direct result of the sale of the Graphic Sciences assets, funds
11 totaling approximately \$2.2 million were wired to Lasher on the Debtor’s behalf on October 4,
12 2011. An email dated September 29, 2011, from Nitz directing the Purchaser to wire \$2,196,544
13 to Lasher is attached to the Smith Decl. as **Exhibit 11**.⁸ Lasher attorney Hanchett was copied on
14 the email.

15 C. Lasher’s Knowledge of Sale of Graphic Sciences.

16 Lasher became aware of the potential sale of Graphic Sciences no later than July 25,
17 2011, when Vandenberg attorney Nitz and Lasher attorney Steen had a long telephone call about
18 the matter. Lasher’s July 25, 2011, time records contain the following entry for Steen: “Voice
19 mail, correspondence, and teleconference with Mr. Nitz regarding potential sale transaction of

20 ⁷ As previously noted, the Debtor, represented by Lasher, did not at any time disclose any
21 amounts owed to him by Graphic Sciences in his Schedules.

22 ⁸ Nitz and the Vandenberg firm had been hired in May 2010 to represent the Debtor solely with
23 regard to IDC issues as reflected in ECF documents no. 27, 28, and 31. They were subsequently
24 hired in August 2011, by Graphic Sciences to represent it in the sale to the Purchaser. A copy of
25 the engagement letter with Graphic Sciences dated August 10, 2011, is attached to the Smith
26 Decl. as **Exhibit 12**. Interestingly, notwithstanding the engagement by Graphic Sciences and the
lack of authorization to represent the Debtor regarding the matter, paragraph 13.11 of the Final
Purchase Agreement expressly states that Vandenberg “has acted as counsel for Gary McLean,
and is not counsel to any other party.” (Emphasis added). That provision in the Final Purchase
Agreement was actually requested by Nitz, as reflected in the email attached to the Smith Decl.
as **Exhibit 9**.

1 Mr. McLean's interests in Graphic Sciences and potential credits, debits in transaction and
2 relation to bankruptcy process. (.8) Research Mr. McLean's debts associated with Graphic
3 Sciences, review file and confer with counsel regarding same and dismissal (1.7)." A copy of
4 Lasher's time records for services in the Case between June 9, 2011 (when the Initial LOI was
5 signed) and September 30, 2011 (the last time records produced) (the "Lasher Time Records"), is
6 attached to the Smith Decl. as **Exhibit 13**.

7 Hanchett testified that he first became aware of the potential sale from Steen, probably
8 sometime in August 2011. *See* excerpts from the transcript of Hanchett's Bankruptcy Rule 2004
9 examination held on November 24, 2015 (the "Hanchett Exam Transcript"), p. 22, ll.15-22,
10 attached to the Smith Decl. as **Exhibit 14**. Hanchett then had subsequent discussions with Nitz
11 about the sale, also in August, 2011. *Id.* at p. 21, ll. 16-23. The Lasher and Vandenberg⁹ time
12 records shed some light on what was going on within the firms relating to the Graphic Science
13 sale:

<u>Date</u>	<u>Description of Services</u>
7/11/11	"Review Mosley Holdings letter of intent and due diligence materials; prepare for and attend meeting with G. McLean regarding same." (2.5) [Vandenberg time records];
7/13/11	"Prepare for and attend meeting with G. McLean regarding status." (.3); [Vandenberg time records];
7/21/11	"Prepare for and attend meeting with [Purchaser] and G. McLean regarding proposed asset purchase; revise and circulate letter of intent." (1.8) [Vandenberg time records];
7/26/11	"Research estates [sic] interests in Graphic Sciences and debts owing related to same (1.8)" [Lasher time records];

24 ⁹ The applicable Vandenberg time records (the "Vandenberg Time Records") are attached to the
25 Smith Decl. as **Exhibit 15**. The invoices cover the period July 11, 2011, through October 3,
26 2011 and purport to be for services as outside counsel to Graphic Sciences. However, as
reflected in **Exhibit 12** to the Smith Decl., Vandenberg was not employed by Graphic Sciences
until August 10, 2011. Apparently Vandenberg was paid \$6,286.82 by an unknown party for
these services in October 2011 according to the invoices.

1	8/10/11	“Review and comment on asset purchase agreement; review and respond to correspondence regarding same; discuss same with G. McLean.” (1.2) [Vandeberg time records];
2		
3	8/17/11	“Revise and circulate asset purchase agreement; discuss same with G. McLean.” (1.2) [Vandeberg time records];
4		
5	8/18/11	“Prepare for and attend meeting with G. McLean; revise and circulate asset purchase agreement; prepare and circulate use of proceeds worksheet; draft non-compete agreements.” (3.8) [Vandeberg time records];
6		
7		
8	8/18/11	“Conference with Gary [McLean] and Daren [Nitz] re status of dismissal. (1.5)” [Lasher time records];
9		
10	8/21/11	“Revise and circulate draft non-compete agreements; revise purchase agreement; draft correspondence regarding structure and escrow agreement.” (.8) [Vandeberg time records];
11		
12	8/24/11	“Prepare for and attend call with T. Drake, counsel for [Purchaser]; revise and circulate documents; review and comment on revised purchase agreement and draft escrow agreement.” (.7) [Vandeberg time records];
13		
14	8/25/11	“Discuss transaction with T. Drake and G. McLean; review and comment on release.” (.5) [Vandeberg time records];
15		
16	8/29/11	“Review and comment on financial statement summaries; [rest of description redacted]” (1.10) [Vandeberg time records]; ¹⁰
17		
18	8/31/11	“Analyze IDC claims regarding Graphic Science debt and voicemail to Mr. Nitz regarding same. (.5)” [Lasher time records];
19		
20	9/1/11	“Review and comment on release; review ancillary agreements.” (.3) [Vandeberg time records];
21		
22	9/15/11	“Revise and circulate non-compete agreements; discuss same with T. Drake.” (.8) [Vandeberg time records];

¹⁰ Also on August 29, 2011, Nitz sent an email to the Debtor about the Graphic Sciences sale reflecting a possible distribution of the sale proceeds to the Debtor of \$1,786,544, including \$896,544 for a net note repayment and \$890,000 for a non-compete. Importantly, the email was copied to Hanchett at Lasher. A copy of the email is attached to the Smith Decl. as **Exhibit 16**.

1 9/16/11 “Prepare and circulate indemnification agreement; review and respond to
2 comments regarding transaction documents.” (.4) [Vandeberg time
3 records];
4 9/19/11 “Review and comment on revised note; review releases.” (.4) [Vandeberg
5 time records];
6 9/29/11 “Prepare for and attend meeting with G. McLean and K. Hanchett; finalize
7 ancillary agreements.” (2.5) [Vandeberg time records]; and
8 9/29/11 “Meeting with Gary [McLean] and Daren [Nitz] re plan moving forward.
 (1.5)” [Lasher time records].

9 The billing records and other documents plainly indicate that during July, August, and
10 September 2011, both Lasher and Vandeberg were actively engaged in advising the Debtor and
11 others regarding the Graphic Sciences asset sale. Lasher cannot credibly deny that it was aware
12 of the Graphic Sciences sale and related transactions prior to the hearing on the Dismissal
13 Motion.

14 D. The Debtor’s Use of the Graphic Sciences Proceeds.¹¹

15 Lasher received \$2.2 million on October 4, 2011, 12 days after the Dismissal Motion
16 hearing and while the Case was still open. On October 6 and 7, 2011, Lasher transferred most of
17 those funds as follows:

- 18 • \$220,696 to Lasher for legal services provided during the Case between October 1,
19 2010, and September 30, 2011, for which Lasher did not obtain approval from the
20 Court;¹²
- 21 • \$34,593 to Vandeberg for services during the Case between November 1, 2010, and
22 July 31, 2011;

23 ¹¹ A copy of a document titled Graphic Sciences Transaction Proceeds Summary, produced by
24 Lasher (the “Transaction Summary”), is attached to the Smith Decl. as **Exhibit 17**.

25 ¹² On or about December 27, 2011, Lasher also applied \$1,842.40 of funds it was holding to pay
26 itself for expenses or services to the Debtor. *See* the Transaction Summary attached to the Smith
27 Decl. as **Exhibit 17**. Between the \$146,739 Lasher was paid in December 2010 pursuant to the
28 Fee Order, and the funds paid in October and December 2011, Lasher has received at least
29 \$369,277 for services to the Debtor from the Petition Date through September 2011. The
30 amount, if any, paid by the Debtor to Lasher for services after September 2011 is unknown.

- \$800,000 to Ms. Durflinger, the Debtor's self-described "girlfriend" who was listed on the Debtor's amended Schedule F as having a claim for \$17,000;
- \$400,000 to GMMD Consulting, LLC, whose only two members are the Debtor and Ms. Durflinger;
- \$100,000 to GMMD Holdings, LLC, another entity whose only two members are the Debtor and Ms. Durflinger;
- \$300,000 to Longhaul, LLC, an entity formed to hold a yacht, and whose two members are the Debtor and an individual named Manfred Scharmach; and
- \$50,000 to Vine & Sun, LLC, a winery that the Debtor is one of five members of.

Lasher distributed another approximately \$292,000 of the Graphic Sciences funds after the Case was closed, including: \$200,000 to GMMD Holdings, LLC on January 24, 2012; \$36,000 to Vine & Sun, LLC on March 14, 2012; and \$56,065 to GMMD Consulting, LLC on July 6, 2012. *See* Transaction Summary.

According to the Debtor, much of the money Lasher originally sent to his companies was ultimately re-routed and used by him to pay his own bills. For example, when asked at his Rule 2004 examination what happened to the \$200,000 sent to GMMD Holdings, LLC in January 2012, the Debtor testified: "I took it back to pay bills." *See* excerpts from the transcript of the Debtor's Bankruptcy Rule 2004 examination held on December 3, 2015 (the "Debtor's Exam Transcript"), p.43, ll.15-16. The Debtor similarly testified that the \$400,000 sent to GMMC Consulting, LLC and the \$100,000 sent to GMMC Holdings, LLC in October 2011 was used to pay bills. *Id.* at pp. 38, ll.8-25; p. 39, ll. 1-9; p. 49, ll. 21-23. Finally, he testified that as to the \$300,000 sent to Longhaul, LLC, he "took some of it back" although he could not remember how much. *Id.* at p.40, ll.8-25; p. 41, ll. 1-23. A copy of the Debtor's Exam Transcript is attached to the Smith Decl. as **Exhibit 18**.

E. Lasher's Lack of Disclosure of the Graphic Sciences Transactions to Creditors.

Lasher, and specifically Hanchett, negotiated with IDC and Ms. McLean over the course of several weeks to resolve their objections to the Dismissal Motion during the time between the

1 filing of, and hearing on, the motion. Ultimately, the parties settled and the objections to
2 dismissal were withdrawn the day before the hearing. Kimball Decl., ¶¶ 19, 20.

3 Lasher's own records reflect that its attorneys were actively engaged in the Graphic
4 Sciences deal during the negotiations. Despite that, Hanchett never advised Wenokur or Kimball
5 of the imminent transactions that were to result in the Debtor receiving \$2.2 million. Kimball
6 Decl., ¶ 20. Lasher's concealment of the Graphic Sciences asset sale and related transactions,
7 and the disposition of the funds from the transactions, continued for years. Kimball Decl., ¶¶ 21-
8 23.

9 Lasher's motivation for concealing the Graphic Sciences transactions is apparent: rather
10 than the \$2.2 million becoming property of the estate and subject to the claims of the Debtor's
11 creditors (particularly the large claims of IDC and Ms. McLean), the Debtor obtained the full
12 benefit of the transaction proceeds, and Lasher received \$220,000 towards its fees without
13 exposing its fees to the objections of creditors by following the process of obtaining approval
14 from the Court. Through their active concealment of the Graphic Sciences transaction, the
15 Debtor and Lasher benefited tremendously, while the estate's creditors received nothing from the
16 sale and were thereby severely prejudiced.

17 A series of emails between Lasher's Hanchett and Ms. McLean's counsel Wenokur and
18 Kimball in the two weeks following Lasher's receipt of the Debtor's \$2.2 million demonstrates
19 the extent of Hanchett's active concealment of the Graphic Sciences sale (collectively, the "Post-
20 Dismissal Emails"). The Post-Dissmissal Emails are attached to the Smith Decl. as **Exhibit 19**.
21 In the emails, Hanchett initially informed Wenokur that there was an offer to purchase an asset
22 (unrelated to Graphic Sciences) of the Debtor for \$200,000. Hanchett sought Ms. McLean's
23 consent to the transaction because of her lien on the asset. Hanchett also asked that the proceeds
24 of the sale of that asset be divided evenly between the Debtor and Ms. McLean. Wenokur
25 questioned why the Debtor should receive any of the proceeds given Ms. McLean's lien, and
26 Hanchett responded on October 18, 2011: "Gary needs some money to live on as he works to
find a new job." Wenokur then made a counteroffer for the Debtor to receive \$5,000, and

1 Hanchett replied: "But the reality is that Gary is trying to survive and is trying to find a job and
2 needs some help in this regard. Would Kathy agree to allow Gary to keep \$50,000?" Based on
3 Hanchett's representations, Ms. McLean agreed to allow the Debtor to retain 20% of the
4 proceeds, not to exceed \$40,000. Ultimately, the Debtor received almost \$39,000 from the
5 asset's sale. Kimball Decl., ¶ 21. Hanchett's representations about the Debtor's financial
6 circumstances were knowingly and completely false. As shown by the Transaction Summary
7 attached to the Smith Decl. as **Exhibit 17**, at the time Hanchett advised Wenokur that the Debtor
8 needed financial help and was "trying to survive" Lasher still held \$274,865 of the Graphic
9 Sciences sale proceeds for the Debtor, in addition to the \$1.65 million that Lasher already
10 disseminated to Ms. Durflinger and various entities owned or controlled by the Debtor.
11 Hanchett's affirmative false representations to Wenokur are further evidence of the intentional
12 deception and concealment he and Lasher engaged in to defraud the Court and creditors.

13 F. Lasher's Lack of Disclosure of Sale of Graphic Sciences to the Court.

14 Lasher first became aware of the potential sale of Graphic Sciences' assets no later than
15 July 25, 2011. It was on that date, according to Lasher's time records, that Nitz called and spoke
16 with Lasher's Steen about the matter -- five days after the Debtor signed the Second LOI, and 60
days before the Dismissal Motion hearing.

17 In August, 2011, Lasher apparently received at least one draft of the Purchase Agreement
18 to review. Further, Hanchett met with Nitz and the Debtor for 1.5 hours on August 18, 2011;
19 Nitz's only work for the Debtor or Graphic Sciences during that time period was related to the
20 Graphic Sciences deal, for which Graphic Sciences had formally engaged Nitz's on August 10.
21 In addition, Hanchett knew from Nitz's August 29, 2011, email, which Hanchett was copied on,
22 that the Debtor could expect to receive almost \$1.8 million (eventually \$2.2 million) from the
23 pending Graphic Sciences transactions. The Final Purchase Agreement, which called for a
24 closing date of October 4, 2011, was signed two days before the Dismissal Motion hearing.

25 Despite having substantial knowledge of the Debtor's imminent windfall, Lasher never
26 informed the Court of the Graphic Sciences transactions. Rather, Lasher, by failing to disclose

1 the Graphic Sciences sale in the Dismissal Reply and by failing to correct its previous statements
2 regarding the Debtor's supposedly dire financial condition and inability to reorganize, chose to
3 affirmatively mislead the Court. The Dismissal Reply also falsely represented that IDC and Ms.
4 McLean would not be prejudiced by dismissal – a representation that Lasher knew was untrue
5 given it's active participation in the ongoing scheme to receive and disburse the Debtor's \$2.2
6 million from the Graphic Sciences transactions to itself, the Debtor, and the Debtor's insiders.

7 When Hanchett was asked at his examination why the Court was not told about the sale
8 in the Dismissal Reply, he gave two reasons: 1) that the sale "continued to be a potential for
9 recovery, but it was not a certainty;" and 2) the asset (i.e. the Debtor's 50% interest in Graphic
10 Sciences) had been disclosed, and a deal had already been struck with Ms. McLean and IDC.
11 Hanchett Exam Transcript, attached to the Smith Dec. as **Exhibit 14**, p. 43, ll.14-25; p. 44, ll. 1-
12 25; p. 45, ll. 1-25; and p. 46, ll. 1-20. Both arguments are absurd.

13 Firstly, the position that the Court and parties in interest need only be informed of
14 transactions which will substantially impact the estate and administration of the case once they
15 become a certainty goes against the basic principles of transparency and fair play underlying the
16 bankruptcy system. Further, this position goes against the facts at issue here; by the time of the
17 hearing on the Dismissal Motion, the Final Purchase Agreement had been signed and a closing
18 date scheduled.

19 Hanchett's second rationale is similarly flawed, because it relies upon the existence of
20 fraudulently obtained settlements to excuse Lasher's omissions and false representations to the
21 Court. The indisputable facts reflect that Lasher actively conspired with the Debtor to perpetrate
22 a fraud on this Court in order to obtain dismissal of the Case.

23 I. ARGUMENT

24 A. Disgorgement Under the Court's Inherent Authority.

25 A bankruptcy court has the inherent authority to regulate the practice of attorneys who
26 appear before it. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43, 111 S.Ct. 2123 (1991); *Haeger v.*
Goodyear Tire & Rubber Co., 813 F.3d 1233, 1243 (9th Cir. 2016); *Price v. Bronitsky (In re*

1 *Lehtinen*, 564 F.3d 1052, 1058 (9th Cir. 2009); *Caldwell v. Unified Capital Corp. (In re*
2 *Rainbow Magazine, Inc.)*, 77 F.3d 278, 284-85 (9th Cir. 1996).

3 Such inherent authority may be used to address “bad faith” or “willful misconduct,” even
4 in the absence of express statutory authority to do so. *Lehtinen*, 564 at 1058 (citing *Knupfer v.*
5 *Lindblade (In re Dyer)*, 322 F.3d 1178, 1187 (9th Cir.2003)). Sanctionable acts include those
6 where (1) a party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons, (2)
7 when a party participates in an abuse of process or other dilatory conduct, or (3) when the court
8 finds “that fraud has been practiced upon it, or that the very temple of justice has been defiled.”
9 *Chambers*, 501 U.S. at 46–47 (citations omitted); *Caldwell v. Unified Capital Corp. (In re*
10 *Rainbow Magazine, Inc.)*, 77 F.3d 278, 284 (9th Cir. 1996). *See also Fink v. Gomez*, 239 F.3d
11 989, 992-93 (9th Cir. 2001). “There is an irrefragable linkage between the courts’ inherent
12 powers and the rarely-encountered problem of fraud on the court. Courts cannot lack the power
13 to defend their integrity against unscrupulous marauders; if that were so, it would place at risk
14 the very fundament of the judicial system.” *Aoude v. Mobil Oil Corp.*, 892 F.2d 1115, 1119 (1st
15 Cir. 1989) (appellate court confirmed exercise of inherent authority to dismiss case where there
16 was fraud on the court arising from the filing of a complaint based on a fabricated purchase
agreement).

17 Bankruptcy courts may order total disgorgement of attorney’s fees pursuant to their
18 inherent authority over the debtor’s attorney’s compensation. *Law Offices of Nicholas A. Franke*
19 *v. Tiffany (In re Lewis)*, 113 F.3d 1040, 1045 (9th Cir. 1997) (disgorgement of fees under
20 inherent authority upheld). A specific finding of bad faith generally must precede any sanction
21 under the court’s inherent powers. A finding of bad faith can be appropriate even where the
22 pleadings or actions under scrutiny are not completely frivolous or meritless, if the motivation
23 for them was improper. *In re Itel Securities Litigation*, 791 F.2d 672, 675 (9th Cir. 1986).
24 While recklessness alone is not sufficient, sanctions can be appropriate under inherent powers
25 where the court finds conduct “tantamount to bad faith. Sanctions are available for a variety of
26 types of willful harassment, or an improper purpose. Therefore, we hold that an attorney’s

1 reckless misstatements of law and fact, when coupled with an improper purpose, such as an
2 attempt to influence or manipulate proceedings in one case in order to gain tactical advantage in
3 another case, are sanctionable under a court's inherent power." *Fink*, 239 F.3d at 993-94.

4 Lasher has perpetrated a fraud on the Court by filing at least one intentionally misleading
5 pleading, and otherwise concealing and failing to disclose material information to the Court in a
6 successful fraudulent scheme with the Debtor to get obtain dismissal of the Case so that the
7 Debtor would not have to share his \$2.2 million windfall with his creditors. Lasher has also
8 violated the Washington Rules of Professional Conduct by failing in its duty of candor to the
9 Court, and breached its fiduciary duty to the estate and creditors. Under these circumstances, the
10 United States Trustee requests that the Court invoke its inherent authority to order the
11 disgorgement of all fees received by Lasher for services to the Debtor during the Case, which
12 appear to be approximately \$369,000. The disgorged fees should be paid into the registry of the
13 Court pending further order.

14 1. The Court Should Use Its Inherent Authority to Order Disgorgement Because
15 Lasher Perpetrated a Fraud on the Court.

16 Whether there has been a "fraud on the court" typically arises in the context of a motion
17 under Rule 60 of the Federal Rules of Civil Procedure, which governs relief from a
18 judgment or order based on a finding of fraud on the court. *See, e.g., Ehrenberg v. Roussos (In*
19 *re Roussos)*, 541 B.R. 721 (Bankr. C.D. Cal. 2015) (a 21-year old bankruptcy sale may be set
20 aside for fraud on the court under Rule 60(d)(3)). The Court's inherent power can be invoked
21 even where statutes or rules exist which sanction the same conduct. *Haeger*, 813 F.3d at 1243.
22 Actions constituting a fraud upon the court are sufficient to support a bad faith finding. *Id.* at
23 1244. The United States Trustee is not seeking relief from a judgment or order, but the case law
24 regarding what constitutes fraud on the court is instructive to the relief sought herein.

25 In addition to setting aside an order or judgment under Rule 60(b) that is procured by
26 fraud on the court, "it is within the Bankruptcy Court's equitable powers to award a party
attorney's fees, order a disgorgement of fees collected, or award costs or other penalties where a

1 party is found to have committed fraud on court.” *In re R&R Associates of Hampton*, 248 B.R.
2 1, *6 (Bankr. D.N.H. 2000) (citing *Universal Oil Products Co. v. Root Refining Co.*, 328 U.S.
3 575, 580, 66 S.Ct. 1176 (1946)). *See also Continental Ill. Nat’l Bank & Trust Co. of Chi. v.*
4 *Charles N. Wooten, Ltd. (In re Evangeline Ref. Co.)*, 890 F.2d 1312, 1323-24 (5th Cir. 1989)
5 (citing *Matter of Futuronics Corp.*, 655 F.2d 463, 471 (2d Cir. 1981)) (“Because fraud on the
6 court and estate is misconduct of the highest order, courts have denied all compensation despite
7 benefits to the estate.”); *Denison v. Marina Mile Shipyard, Inc. (In re Denison)*, 2012 WL 75768
8 *5 (S.D. Fla. Jan. 10, 2012) *aff’d* 497 Fed.Appx. 882 (11th Cir. 2012) (a bankruptcy court has
9 the inherent authority to order disgorgement of fees upon a finding of fraud on the court); *In re*
10 *NWFX, Inc.*, 267 B.R. 118, 221 (Bankr. W.D. Ark. 2001) (trustee’s fees of \$199,979 ordered
11 disgorged because of fraud on the court by the trustee: “When a trustee misrepresents facts to the
12 Court with knowledge of their falsity, denial of compensation is appropriate.”).

13 “Because corrupt intent knows no stylistic boundaries, fraud on the court can take many
14 forms.” *Aoude*, 892 F.2d at 1118. The Ninth Circuit Court of Appeals has articulated fraud on
15 the court as “fraud that defiles the court or is perpetrated by officers of the court. When we
16 conclude that the integrity of the judicial process has been harmed, however, and the fraud rises
17 to the level of ‘an unconscionable plan or scheme which is designed to improperly influence the
18 court in its decisions,’ we not only can act, we should.” *Dixon v. Comm’r*, 316 F.3d 1041, 1046
19 (9th Cir. 2003) (emphasis added) (quoting *England v. Doyle*, 281 F.2d 304, 309 (9th Cir. 1960)).
20 *Accord U.S. v. Stonehill*, 660 F.3d 415, 444-45 (9th Cir. 2011); *In re Levander*, 180 F.3d 1114,
21 1119 (9th Cir. 1999); *Gumport v. China Int’l Trust and Inv. Corp. (In re Intermagnetics*
22 *America, Inc.)*, 926 F.2d 912, 916 (9th Cir. 1991). *See also H.K. Porter Co. Inc. v., Goodyear*
23 *Tire & Rubber Co.*, 536 F.2d 1115, 1119 (6th Cir. 1976) (because attorneys are officers of the
24 court, dishonest conduct on their part constitutes fraud on the court).

25 The inquiry is not focused on prejudice to parties. Instead, it is whether the alleged fraud
26 harms the integrity of the judicial process. *U.S. v. Stonehill*, 660 F.3d at 444. Also, fraud on the
court can be established where the acts and omissions evidence “a *pattern* of misconduct clearly

1 aimed at preventing the court from making a fair and well-informed assessment” even where any
2 particular act of misconduct viewed in isolation would not rise to that level. *United Business*
3 *Communications, Inc. v. Racal-Milgo, Inc.*, 591 F.Supp. 1172, 1187 (D.Kan. 1984) (finding
4 fraud on the court based on party’s presentation of false testimony, fabrication, and
5 nondisclosure of relevant information). Fraud must be established by clear and convincing
6 evidence. *England v. Doyle*, 281 F.2d at 310.

7 Generally, non-disclosure does not, by itself, amount to fraud on the court. *U.S. v.*
8 *Stonehill*, 660 F.3d at 444 (citing *In re Levander*, 180 F.3d at 1119). However, this general rule
9 is based on the assumption that the parties are aware of the non-disclosure at the time and can
10 therefore challenge it. *Levander*, 180 F.3d at 1120. Non-disclosure constitutes fraud on the
11 court where, as here, the material underlying facts or their non-disclosure could not have been
12 contested at the hearing on dismissal of the Case as a result of Lasher’s active concealment. *Id.*

13 Shortly after the Dismissal Motion was filed, the Debtor signed the Second LOI and,
14 with Lasher’s knowledge, began finalizing the sale of Graphic Sciences’ assets. The Final
15 Purchase Agreement was dated two days prior to the hearing on the Dismissal Motion. At no
16 time, either in its pleadings relating to the Dismissal Motion or at the hearing, did Lasher inform
17 the Court about the pending sale of assets and related transaction. Instead, Lasher
18 intentionally misled the Court to obtain relief for the Debtor that may not have been granted if
19 the Court was fully informed. For its efforts, Lasher subsequently received over \$220,000 in
20 fees from sale-related proceeds that, but for Lasher’s concealment, would have entered the estate
21 for proper administration. To compound its wrongful acts, Lasher itself acted in concert with the
22 Debtor to disseminate the remaining sale-related proceeds as part of the scheme to place those
23 funds out of reach of the Debtor’s creditors. Lasher then concealed the receipt and use of the
24 \$2.2 million for years in its continuing conspiracy with the Debtor to ensure creditors did not
25 receive any of the money.

26 The United States Trustee has submitted clear and convincing evidence that Lasher has
engaged in bad faith actions constituting fraud on the Court through a documented

1 “unconscionable plan or scheme which is designed to improperly influence the court in its
2 decision.” Under these facts and circumstances, Lasher should be required to disgorge all
3 funds it received in connection with the Case.

4 2. The Court Should Use Its Inherent Authority to Order Disgorgement Because
5 Lasher Failed in Its Duty of Candor.

6 As attorneys admitted to practice in the State of Washington, Lasher’s attorneys had an
7 obligation to comply with Washington’s Rules of Professional Conduct (the “RPC”).¹³ RPC
8 Rule 3.3 states:

9 (a) A lawyer shall not knowingly:

10 (1) make a false statement of fact or law to a tribunal or fail to correct a false
11 statement of material fact or law previously made to the tribunal by the lawyer;

12 (2) fail to disclose a material fact to a tribunal when disclosure is necessary to
13 avoid assisting a ... fraudulent act by the client unless such disclosure is prohibited by
14 Rule 1.6;

15 (3) fail to disclose to the tribunal legal authority in the controlling jurisdiction
16 known to the lawyer to be directly adverse to the position of the client and not disclosed
17 by the opposing party; or

18 (4) offer evidence that the lawyer knows to be false.

19 (b) The duties stated in paragraph (a) continue to the conclusion of the
20 proceeding.

21 (c) If the lawyer has offered material evidence and comes to know of its falsity,
22 the layer shall promptly disclose this fact to the tribunal unless such disclosure is
23 prohibited by Rule 1.6.

24 ///

25 ///

26 ¹³ See LCR 83.3(a)(2) for the U.S. District Court for the Western District of Washington (to
maintain effective administration of justice and the integrity of the court, attorneys shall be
familiar with and comply with, among other things, the RPC).

1 (d) If the lawyer has offered material evidence and comes to know of its falsity,
2 and disclosure of this fact is prohibited by Rule 1.6, the lawyer shall promptly make
3 reasonable efforts to convince the client to consent to disclosure. If the client refuses to
4 consent to disclosure, the lawyer may seek to withdraw from the representation in
5 accordance with Rule 1.16.

6 (e) A lawyer may refuse to offer evidence that the lawyer reasonably believes is
7 false.

8 (f) In an ex parte proceeding, a lawyer shall inform the tribunal of all material
9 facts known to the lawyer that will enable the tribunal to make an informed decision,
10 whether or not the facts are adverse.

11 “The general principle that a breach of ethical duties may result in denial or disgorgement
12 of fees is well recognized” and within the inherent power of the trial court. *Eriks v. Denver*, 118
13 Wash.2d 451, 462-63, 824 P.2d 1207, 1213 (1992) (en banc) (citations omitted).

14 “Disgorgement of fees is a reasonable way to ‘discipline specific breaches of professional
15 responsibility, and to deter future misconduct of a similar type.’” *Id.* at 1213 (quoting *In re*
16 *Eastern Sugar Antitrust Litig.*, 697 F.2d 524, 533 (3d Cir. 1982)).

17 As the Ninth Circuit has recognized, “With respect to the court’s inherent power, ... an
18 attorney admitted to a particular bar may be disciplined for conduct that violates that bar’s local
19 rules of professional conduct.” *U.S. v. Wunsch*, 84 F.3d 1110, 1114 (9th Cir. 1996) (reversing
20 the district court’s disqualification of an attorney because the attorney’s actions were found to
21 not violate the applicable rules and statutes at issue). *See also Roy Lubit, M.D. v. Chase (In re*
22 *Chase)*, 372 B.R. 142, 154-55 (Bankr. S.D.N.Y. 2007) (in invoking inherent power to bar
23 recovery of additional fees where attorney violated local rules, ethical rules, and Bankruptcy
24 Rules, the court recognized its broad discretion in fashioning sanctions stating “the punishment
25 should fit the crime.”).

26 Ordering the return of attorneys’ fees for breaches of professional responsibility serves
two purposes: to discipline the firm for the breach or breaches, and to deter future misconduct of

1 a similar type. *In re Eastern Sugar Antitrust Litig.*, 697 F.2d at 533. With respect to whether
2 fees should be disgorged for services prior to the breach, the court stated:

3
4 We agree that return of fees paid for services rendered before the date of the
5 impropriety may be an appropriate remedy for some ethical violations. Yet,
6 because such a remedy provides the client with a windfall and deprives the
7 attorney of fees earned while acting ethically, we believe such a sanction should
8 be reserved for cases in which the breach of professional ethics is so egregious
9 that the need for attorney discipline and deterrence of future improprieties of
10 that type outweighs the former concerns.

11 *Id.* (citations omitted).

12 Here, Lasher's attorneys violated RPC 3.3 in numerous ways, and thereby failed in their
13 duty of candor to the Court. Specifically, at a minimum, Lasher breached RPC's 3.3(a)(1), (2),
14 (4), and (c) when it (i) filed the false and misleading Dismissal Reply; and (ii) failed to either
15 amend its pleadings to disclose the Graphic Sciences asset sale prior to the hearing on dismissal
16 or inform the Court of the sale at the hearing on the Dismissal Motion. The appropriate remedy
17 for Lasher's egregious violation of its duty of candor to the Court is disgorgement of all fees
18 received for services during the Case.

19
20 3. Lasher Violated Its Fiduciary Duty to the Estate and Creditors.

21 A chapter 11 debtor in possession stands in the shoes of a trustee and is a fiduciary for
22 the estate and its creditors. 11 U.S.C. § 1107(a). *See, e.g., Thompson v. Margen (In re*
23 *McConville)*, 110 F.3d 47, 50 (9th Cir. 1997) (chapter 11 debtors in possession "were fiduciaries
24 of their own estate owing a duty of care and loyalty to the estate's creditors"), *cert. denied*, 522
25 U.S. 966 (1997); *Woodson v. Fireman's Fund Ins. Co. (In re Woodson)*, 839 F.2d 610, 614 (9th
26 Cir. 1988) (as a fiduciary for his creditors, a chapter 11 debtor in possession "is required to turn
square corners and avoid conduct that would prejudice the rights of those whose interests he is
required to protect.").

Most courts also view an attorney for a debtor in possession as a fiduciary of the
bankruptcy estate. *See, e.g., Brown v. Gerdes*, 321 U.S. 178, 182, 64 S.Ct. 487 (1944) ("In all
cases persons who seek compensation for services or reimbursement for expenses are held to

1 fiduciary standards.”); *In re Taxman Clothing Co.*, 49 F.3d 310, 314 (7th Cir. 1995) (“A lawyer
2 hired by a trustee in bankruptcy to do legal work for the estate, like the trustee himself, is a
3 fiduciary of the estate.”); *Continental Ill. Nat’l Bank & Trust Co. of Chi. v. Charles N. Wooten,*
4 *Ltd. (In re Evangeline Ref. Co.)*, 890 F.2d 1312, 1323 (5th Cir. 1989) (stating that as officers of
5 the court “trustees and attorneys for trustees are held to high fiduciary standards of conduct”);
6 *Pierson & Gaylen v. Creel & Atwood (In re Consol. Bancshares, Inc.)*, 785 F.2d 1249, 1256 n. 7
7 (5th Cir. 1986) (observing that “court-appointed attorneys are officers of the court and
8 fiduciaries”). *Cf. ICM Notes, Ltd. v. Andrews & Kurth, LLP*, 278 B.R. 117, 126 (S.D. Tex.
9 2002) *aff’d per curiam*, 324 F.3d 768 (5th Cir. 2003) (a debtor-in-possession’s counsel does not
10 have a fiduciary duty to a particular creditor).

11 If the attorney and client disagree, counsel must refrain from filing bad faith or frivolous
12 pleadings and ultimately withdraw if the high standard for withdrawal is met. *Everett v. Perez*
13 *(In re Perez)*, 30 F.3d 1209, 1219 (9th Cir.1994) (attorney for an individual the chapter 11 debtor
14 proposed three deficient plans of reorganization that the court viewed as beneficial to the debtor,
15 but not necessarily to the estate or in conformance with the attorney’s fiduciary responsibilities).

16 In *Perez*, the Ninth Circuit explained:

17 Counsel for the estate must keep firmly in mind that his client is the estate and not
18 the debtor individually. Counsel has an independent responsibility to determine
19 whether a proposed course of action is likely to benefit the estate or will merely
20 cause delay or produce some other procedural advantage to the debtor. While he
21 must always take his directions from his client, where counsel for the estate
22 develops material doubts about whether a proposed course of action in fact serves
23 the estate’s interests, he must seek to persuade his client to take a different course
24 or, failing that, resign. Under no circumstances, however, may the lawyer for a
25 bankruptcy estate pursue a course of action, unless he has determined in good
26 faith and as an exercise of his professional judgment that the course complies with
the Bankruptcy Code and serves the best interests of the estate.

We make no finding of wrongdoing here. We simply remind counsel that his
responsibility is to help lead the estate on a just, speedy, inexpensive
and lawful path out of bankruptcy. Failure to live up to this responsibility may
result in a reduction in allowable fees and other sanctions.

Id.

1 Here, clear and convincing evidence demonstrates that Lasher violated its fiduciary duty
2 to the estate and creditors, and actively assisted the Debtor in violating his same duty, by
3 orchestrating and executing a scheme to deprive the estate of some \$2.2 million. In the course of
4 implementing the scheme, Lasher filed at least one false and misleading pleading and concealed
5 material information from the Court and from creditors solely to benefit the Debtor and to the
6 detriment of the estate and creditors. Under these circumstances the United States Trustee
7 asserts that disgorgement of all fees received by Lasher for services during the Case is an
8 appropriate remedy.

9 III. CONCLUSION

10 Lasher and its attorneys' behavior in this case, as described herein, represents a
11 contemptible disregard for this Court, for the standards imposed by the Bankruptcy Code, and
12 for the basic ethical rules and responsibilities incumbent upon all attorneys as officers of the
13 Court. The disgorgement requested in the Motion is appropriate under the circumstances, and
14 designed uphold the integrity of the Court and deter Lasher and its attorneys from future similar
15 behavior. The United States Trustee respectfully requests that the Motion be granted, and that
the Court order:

- 16 1. Disgorgement of all fees paid to Lasher for services in the Case, with payment
17 into the registry of the Court pending further order; and
18 2. Any such other and further relief as the Court deems appropriate.

19 Dated: June 24, 2016.

20 Respectfully submitted,

21 Gail Brehm Geiger
22 Acting U.S. Trustee for Region 18

23 /s/ Martin L. Smith
24 Martin L. Smith, WSBA #24861
Attorney for United States Trustee